Remittitur

Order of Affirmance

COURT OF APPEALS

STATE OF NEW YORK

THE HON. LAWRENCE H. COOKE, *Chief Judge, Presiding*

4 No. 401

The People &c.,

Appellant,

v.

Robert E. Sawyer,

Respondent.

The appellant in the above entitled appeal appeared by Hon. John T. Ward, District Attorney, Chautaugua County; the respondent appeared by Fagan, and Sheffield, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Judge Fuchsberg in which Chief Judge Cooke and Judges Jasen and Meyer concur. Judge Jasen dissents and votes to reverse in an opinion in which Judges Gabrielli and Wachtler concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Chautauqua County Court there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 2, 1982.

[SEAL]

Opinion

STATE OF NEW YORK
COURT OF APPEALS

4 No. 401

The People &c.,
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Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(401) John T. Ward, DA, Chautauqua County, for appellant.
Charles Edward Fagan, Jamestown, for respondent.

FUCHSBERG, J.:

Once again we face sensitive questions associated with an indigent defendant's *pro se* representation in a criminal case.

After trial by jury, defendant, Robert Earl Sawyer, was convicted, and thereafter sentenced to an indeterminate term of twenty-five years to life imprisonment, on two counts of murder arising out of the fatal shooting of a grocery clerk in Stow, Chautauqua County. Upon arraign-

ment, the County Court, on March 2, 1978, advised him of his right to counsel and gave him a week in which to secure one.

On the adjourned date, March 9, Charles Fagan, Esq., who until shortly prior thereto had occupied the post of Public Defender, in which he apparently had developed some familiarity with the charges against the defendant, appeared with him, but only at the instance of the defendant's family and solely, as he explained to the County Judge, for the purpose of pursuing the representation matter. In particular, anticipating that defendant's indigency would require the County Judge to assign counsel, he advanced the argument that a conflict of interest might render the Public Defender's office ineligible for such an assignment. This he premised on the fact that Fagan's successor as Public Defender, Richard V. Slater, Esq., had come to his new office from service as Chief Assistant District Attorney, thus, in turn, creating a vacancy which was filled when an Assistant Public Defender, Ronald J. Gibb, Esq., shifted his employment to the District Attorney's office. The Trial Judge, who, in his position of course had to have been aware of these personnel changeovers in the relatively well-knit legal community of nonmetropolitan Chautauqua County, rejected Fagan's contention with the observation that the court earlier made a disassociation order which separated Slater from the case. Without further exploration of the subject, the Court then adjourned the case to March 16, so that defendant could determine whether Fagan was to be his lawyer.

When, on this date, Fagan again appeared but only to give the Court formal notification that the defendant lacked

sufficient funds to retain private counsel, the Court announced the appointment of Bruce K. Carpenter, Esq., in his official capacity as Assistant Public Defender under Slater, to represent him. The defendant promptly protested, "I don't want the Public Defender, Your Honor." Four days later, the Court notified the defendant that, after further consideration, it had decided that he was not entitled to counsel of his choice, and therefore would either have to stay with Carpenter or proceed *pro se*. Defendant responded that he was not capable of defending himself, but still refused to be represented by the Public Defender. In the course of the colloquy, Carpenter informed the Court that he had been unable to receive any cooperation from the defendant and suggested the appointment of alternate counsel to follow the case and be present at all proceedings. The Court refused to do so or to appoint Fagan in place of Carpenter.

This as prelude, we move to March 22, when the case again appeared on the calendar, this time for pleading. There ensued the following:

> "The Court: And do you want a lawyer?
>
> Defendant: Yes, Your Honor.
>
> The Court: Then, you have the Public Defender, and I am asking you how you plead to this charge?
>
> Defendant: I cannot plead now, Your Honor, because I cannot accept the Public Defender's office as counsel.
>
> The Court: I hold him in contempt of Court. The Public Defender—either you are your own lawyer, or the Public Defender is your lawyer. Now, which? Which?

Defendant: I don't want the Public Defender, Your Honor.

The Court: Then, you are your own lawyer. I enter a plea of not guilty, on your behalf, and I give you 30 days in which to make motions on your behalf.

Mr. Carpenter: [Public Defender]: I take it, an order is entered relieving the Public Defender of representing Mr. Sawyer at this time? Thank you, Your Honor.

* * *

The Court: * * * I don't know how you are going to make your own motions. It's up to you. You have chosen to be your own lawyer, since you will not accept the lawyer I have assigned—

Defendant: I have not chosen—

The Court: You have chosen. I am giving you another chance. You may make your choice. One, represent yourself. Two be represented by the Public Defender. You have no other choice. You are facing a very serious charge. If guilty and convicted, a mandatory sentence is life imprisonment. I strongly suggest you stop playing games with this Court and look out for your own best interests. Your own best interests are probably served by having a lawyer represent you. You will not have me assign anybody, or accept the Public Defender. Now, I know you've been talking with another lawyer. I do not know whether or not he has given you any advice, but if he has given you any advice that is contrary to what the Courts of this State say, obviously, it isn't good advice. Now, if you want the Public Defender, I will re-appoint him; otherwise, you have no lawyer.

Defendant: I want to put on the record, I am not competent to defend myself, Your Honor.

The Court: In that case, I assign the Public Defender again to represent you, and I will not hear you say anything one way or the other. You have a lawyer, or you don't have."

On March 27, defendant was denied bail. At that time, he again refused the services of the Public Defender, who thereupon was formally relieved of further responsibility to the defendant in this exchange:

"The Court: * * * At this time, the Public Defender has pointed out to me that I have not issued a formal order relieving him from the assignment which I made. Is it your desire that you now do so?

Defendant: Your Honor, it is completely up to you.

The Court: No, I am asking you. Would you please answer me yes, or no.

Defendant: We have already discussed this at the last hearing.

The Court: Do you want me to relieve the Public Defender?

Defendant: I do not consent to have him assigned as my counsel.

The Court: And by not consenting, you say as such you would not accept him as your counsel?

Defendant: That's correct.

The Court: And would not cooperate with him; would not talk to him and accept the services of his department, is that correct?

(Whereupon there was no response from the defendant.)

The Court: Is that correct?

(Whereupon there was no response from the defendant.)

The Court: You just don't accept him, period?

Defendant: I do not consent to have him as assigned counsel, Your Honor.

> The Court: Well, I relieve the Public Defender of the assignment which I have made. Please note for the record that Mr. Sawyer is his own counsel as such."

On at least three subsequent occasions before the trial proper eventually got under way, the court offered to make the Public Defender's office available, but the defendant was unswerving in his insistence that, while he desired counsel, he would not accept one from the Public Defender's Office.[1] When his counsel-less defense did take place, the defendant proved the truth of his protestation that he was not competent to represent himself; neither disrespectful nor disorderly, he simply showed no comprehension of the applicable evidentiary or substantive law. In effect, the trial was an inquest.

It was essentially on this record that a sharply divided Appellate Division reversed and granted a new trial. In a writing by Justice Schnepp, the majority reasoned that, granted that an indigent did not have the right to select his assigned counsel, the Trial Judge had properly denied defendant's request, but that, when he relieved Carpenter from further responsibility, the Trial Court improperly deprived the defendant of a continuing choice of either relying on counsel or proceeding on his own. In contrast, the two dissenting justices opined that the defendant effectively waived the right to counsel (83 AD2d 205). Though on a somewhat different rationale than the one it adopted,

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1. The defendant even went so far as to bring an Article 78 proceeding against the trial judge to seek assignment of counsel not associated with the Public Defender. The Fourth Department denied the application. (Appeal dismissed, 45 NY2d 835).

we believe the result the majority reached is the one that should be upheld.

Our analysis begins with the observation that it was incumbent upon the defendant to show "good cause" for the desired substitution. For, while it is true that an indigent defendant is guaranteed the right to assistance of counsel by both our Federal and State Constitutions,[2] this is not to be equated with a right to choose counsel. Thus, while trial judges have a duty to carefully evaluate complaints concerning court-appointed counsel and, when appropriate, effect a change of counsel, "this is far from suggesting that an indigent's request that a court assign new counsel is to be granted casually" (*People v Medina*, 44 NY2d 199, 207; see *People v Brabson*, 9 NY2d 173, 180-181).

Therefore, though a defendant's confidence in appointed counsel is most desirable, as it is in any client-attorney relationship, a bald profession that it is lacking is not controlling. Good cause for such an opinion must be demonstrated before a substitution need follow. It goes without saying, for instance, that most compelling would be a showing that counsel is unable to provide the defendant effective assistance, as, for example, by reason of professional incompetence or the existence of a personal impediment which handicaps his or her professional performance. Surely, a genuine conflict of interest would entitle a defendant to relief.

In the case before us now the only objection raised was the one broadly uttered under the conflict of interest rubric.

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2. NY Const, art I, §6; *People v Koch*, 299 NY 378, 381; US Const, 6th and 14th Amdts; *Argersinger v Hamlin*, 407 US 25; *Gideon v Wainwright*, 372 US 335.

At no time was there anything to even slightly suggest that any of the former members of either the District Attorney's staff or that of the Public Defender who recently had shifted their employments from one of these agencies to the other would not zealously honor the confidences and loyalties assumed in their original positions. Rather, the County Judge made it known to the defendant that he had been circumspect enough to issue a disassociation order which presumably was tailored to minimize the risk, if not entirely avoid the occasion for any occurrence of conflict in fact. And, we note that the Appellate Division, alert to our admonitions in *People v Shinkle* (51 NY2d 417), thought the Trial Judge could draw a distinction between the circumstances created in *Shinkle,* where a defense counsel had joined the prosecutor's office and the converse here, where one formerly allied with the prosecutor had taken over direction of the Public Defender's domain. Finally, absent any oral or written definition of the specifics of the disassociation order or any information on Carpenter's prior vocational history, with neither of which the record here favors us, it can be argued that the details of the order in fact may have mandated a foolproof disassociation procedure and that Carpenter's background and intended modus operandi would have reinforced it.

But then, of course, less summary treatment of the matter than the record revealed could have disclosed a less ideal drawing of disassociation lines or, for instance, allowed for exploration of the relationship, if at all, of Gibbs' successive employments to the handling of defendant's case. Beyond all this, however, "even if the actuality * * * of

prejudice were absent, what of the appearance of things (see Code of Professional Responsibility, Canon 9)?" (*People v Zimmer*, 51 NY2d 390, 395). Or, as *Shinkle*, in its more analogous context, explains, "We recognize that the rule applied in this case may impede the transfer of attorneys between offices of Legal Aid or Public Defender and of District Attorney. This circumstance, however, affords no basis to deny the defendants the right to both the fact *and appearance* of unswerving and exclusive loyalty on the part of attorneys who represent them" (emphasis added) (*Shinkle, supra*, p 421).

Obviously then, to say the least, a fine line here had to be tread. But we need not decide whether it was. This is because a new trial is necessary in any event, since, as we read the record, the Trial Court did not ascertain that the defendant appreciated the risks of self-representation.

For, even if we assume the defendant's request for other counsel was properly denied, in the posture of the two options to which he was confined, his unwillingness to accept Carpenter as counsel left the defendant no way to proceed but *pro se*. This then called upon the Court to give the defendant appropriate warnings. Clearly, this requirement was not diminished because the defendant chose to become a *pro se* litigant because of the strictures of the options open to him rather than in the absence of such restraint. Whatever his displeasure at having to make such a choice, when it ultimately was made, it was unequivocal. Indeed, it can be said that his decision was no less, but perhaps more, definite because it was evidenced by conduct rather than the mounting of a verbal formula.

Opinion

At the root of the rule calling for special inquiry before a defendant may proceed *pro se* is recognition that implicit in a defendant's exercise of the right to do so is a commitment to forego the advantages of counsel (*Faretta v California*, 422 US 807, 835). To make sure this is well understood, more is required than that the right be "unequivocally and timely asserted". Substantively, it must be "knowing and intelligent" as well. (*People v McIntyre*, 36 NY2d 10, 17). To ascertain that it is, the court should undertake a sufficiently "searching inquiry" of the defendant to be reasonably certain that the "dangers and disadvantages" of giving up the fundamental right to counsel have been impressed on the defendant (see *Faretta v California*, 422 US 807, 834, *supra*; *People v White*, —— NY2d ——, decided May 20, 1982, slip opinion p 6). Appropriate "colloquy on the record between the judge and the defendant" will not only test the defendant's understanding, but provide an objective basis for review (*United States v Bailey*, —— F2d —— [31 Crim L Rep 2225]; see *United States v Dujanovic*, 486 F2d 182; *United States v Plattner*, 330 F2d 271).

So measured, the precautionary inquiry in this case was woefully inadequate. In the main, the dialogue consisted of repeated judicial importunities that the defendant accept the services of the Public Defender and their repeated rejection by the defendant. The Court's declarations that defendant was "facing a very serious charge" and that "your own best interests are probably served by having a lawyer represent you" simply did not satisfy the duty to make a "searching inquiry".

Interestingly, the only accounting of dangers of *pro se* representation that found its way into the record was that contained in an excerpt the defendant read from *Gideon v Wainwright* (372 US 335) months after Carpenter had been relieved.[3] Though on its face this language could be deemed most informative, there is no way of telling whether and to what extent the defendant appreciated its significance, or whether he was doing no more than reading uncomprehended language supplied to him by another. Unexplored by a cross-current of colloquy, we are left in the dark.

Finally, since there is to be a new trial, for the guidance of the Trial Court should the situation arise again, we now comment on the matter of "standby counsel". It will be remembered that the Trial Court rejected Assistant Public Defender Carpenter's suggestion, made after reporting on defendant's mistrust, that alternate counsel be appointed to follow the case and be present at all proceedings. On

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3. The defendant made the following statement during discovery proceedings held on July 19, 1978:

> "I'm not familiar with the proceedings going on here, and I have tried, to the best of my ability, to understand what's happening, and something I have read, a Supreme Court Decision, Gideon vs Wainwright: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (See *Gideon v Wainwright*, 372 US 335, 344-345).

this point, we agree, particularly in a case as serious as the one here, that where a defendant decides on self-representation, a judge "may even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary" (*Faretta v California, supra,* p 835 n 46). It may be advisable to do so, to protect the defendant and to facilitate the trial, not only in serious cases, but "in cases expected to be long or complicated or in which there are multiple defendants" (The ABA Standards for Criminal Justice [2d ed], Special Functions of the Trial Judge, Standard 6-3.7)

Accordingly, the order of the Appellate Division should be affirmed.

JASEN, J. (dissenting):

I vote to reverse. By repeatedly rejecting, without good cause, the services of the only attorney to which he was constitutionally entitled, defendant waived his right to counsel. On this point, I am in complete agreement with the views expressed in the dissenting opinion of Justice Richard D. Simons at the Appellate Division. (83 AD2d 205, 210-216.) I find it necessary, however, to comment briefly on the rationale employed by the majority in needlessly sustaining the reversal of defendant's conviction for the brutal murder of a teenage girl.

At the outset, certain facts should be noted. It is not contended that Bruce Carpenter, the Chief Assistant Public Defender assigned to represent the defendant, is other than an experienced, qualified and highly respected trial attorney. At no time in the course of these proceedings

has defendant offered a valid reason for not accepting his services as counsel. Indeed, the record suggests that defendant's refusal to accept Carpenter as his attorney was more the product of appellate counsel's dissatisfaction with the political turnover in the Public Defender's office than any real concern over defendant's constitutional right to full and fair representation at trial.

Be that as it may, defendant at the time of trial was 31 years old and by no means unfamiliar with the criminal justice system. Not only had he served time on prior felony charges, but he was involved in a lengthy extradition proceeding in the State of Maine which ended in his return to this State to face the present murder charges. On both these occasions, defendant was represented by counsel and, as a result, fully exposed to the role played by an attorney in the course of a criminal proceeding.

Although defendant was indigent, there is no indication that he was ignorant or that he lacked a basic understanding of the English language. In fact, the record is directly to the contrary. On each of the several occasions that he was confronted with the choice of either accepting Carpenter or proceeding *pro se,* defendant, while adamantly refusing the Public Defender's assistance, continuously professed an inability to represent himself. Such self-proclaimed incompetence is some indication that he was aware of and appreciated the dangers involved in not being represented by a lawyer at trial. Furthermore, the court specifically advised defendant of the seriousness of the charges he was facing and the term of life imprisonment that could follow upon conviction. In addition, defendant, in the course of his opening statement, expressly acknowledged that "[t]he law is very complex", that "[a] man

has to go through many years of schooling before he can become a lawyer" and asked the court how it expected him "to do this in a few months".

Beyond this, the clearest indication of defendant's subjective appreciation of the risks involved in *pro se* representation came from his own mouth. At one point in the pre-trial proceedings, the defendant addressed the court as follows:

> "I'm not familiar with the proceedings going on here, and I have tried, to the best of my ability, to understand what's happening, and something I have read, a Supreme Court Decision, Gideon vs Wainwright: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence' (See *Gideon* v *Wainwright*, 372 US 335, 344-345)."

Nevertheless, the majority has concluded that a new trial is in order because "the Trial Court did not ascertain that the defendant appreciated the risks of self-representation." (—— NY2d —— [slip op, at p 7].) Yet, I know

of no case in which such a clear articulation on the pitfalls of *pro se* representation has come from the lips of the defendant himself. The majority blithely passes over this part of the record with the unfounded suggestion that there is no way of telling whether defendant understood the significance of what he was saying or whether he was merely "reading uncomprehended language supplied to him by another." (—— NY2d —— [slip op, at p 9].) Such a view is not only highly speculative, but wholly unrealistic. The defendant's recitation concerning the dangers of self-representation provides a far clearer indication of his personal appreciation of the particular risks involved than if the court had uttered the warnings and the defendant merely acknowledged his understanding by a simple "yes".

Nor is there any possibility that further dialogue between the court and the defendant concerning the dangers of self-representation would have altered defendant's unyielding position concerning Carpenter's assistance at trial. On numerous occasions throughout these proceedings, defendant made it clear that he would accept no attorney from the Public Defender's office. Under the circumstances, further questioning by the trial court of the type suggested by the majority would have been futile. On this record, I can only conclude that defendant fully appreciated the danger of proceeding *pro se* and, despite the risks involved, refused the assistance of court-appointed counsel.

No constitutional rights will have been protected by ordering a new trial in this case. Rather, by sanctioning the type of gamesmanship practiced here, this court's decision will only serve to further undermine public confidence in the criminal justice system. No defendant faced with the constitutionally permissible choice of either accepting

competent, court-appointed counsel or proceeding *pro se* should be able to straddle both rights and, in so doing, frustrate the course of a criminal trial. As one court has aptly noted: "[W]e have recognized a right of a defendant to proceed without counsel and to refuse the representation of assigned counsel. * * * [H]e may not use this right to play a 'cat and mouse' game with the court * * * or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel." (*Kates* v *Nelson*, 435 F2d 1085, 1088-1089, quoting *United States ex rel. Davis* v *McMann*, 386 F2d 611, 618-619 [citations omitted].)

Having clearly and unequivocally rejected the only attorney to which he was constitutionally entitled, the sole option that remained was for the defendant to represent himself. He should now be bound by that election. Instead, he is given an unwarranted, second opportunity to put the People to the task of establishing his guilt at trial, five years after the crime was committed. Since it is likely that defendant will not have any different or better counsel on the retrial than was available to him at the first trial, I fully agree with Justice Simons that "[n]either justice nor the appearance that justice has been done is satisfied by such a result." (83 AD2d at p 216.)

* * *

Order affirmed. Opinion by Judge Fuchsberg in which Chief Judge Cooke and Judges Jones and Meyer concur. Judge Jasen dissents and votes to reverse in an opinion in which Judges Gabrielli and Wachtler concur.

Decided July 2, 1982

Order of Reversal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Present:

SIMONS, J.P., HANCOCK, DENMAN, MOULE, SCHNEPP, JJ.

People of the State of New York,

Respondent,

v

Robert E. Sawyer,

Appellant.

The above named Robert E. Sawyer having appealed to this Court from a judgment of the Chautauqua County Court, entered in the Chautauqua County Clerk's office on October 30, 1978 and said appeal having been argued by Charles Fagan of counsel for appellant, John Ward of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is reversed on the law and facts and a new trial is granted.

Opinion by Schnepp, J., which is hereby made a part hereof.

All concur, except Simons, J.P. and Moule, J., who dissent and vote to affirm the judgment, in an Opinion by Simons, J.P.

Entered: Nov. 13, 1981

MARY F. ZOLLER, *Clerk*

Opinion

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

ROBERT E. SAWYER,

Appellant.

Decided September 26, 1978

836 45 NEW YORK REPORTS, 2d SERIES

Appeal dismissed, without costs, by the Court of Appeals *sua sponte*, upon the ground that it does not lie.

Opinion of the Appellate Division Fourth Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

ROBERT E. SAWYER,

Appellant.

SCHNEPP, J.

After a trial by jury defendant Robert E. Sawyer was convicted of common-law murder in the second degree (Penal Law, § 125.25, subd 1) and felony murder in the second degree (Penal Law, § 125.25, subd 3), and sentenced to an indeterminate term of 25 years to life imprisonment. He appeals essentially on the ground that he was denied his right to counsel at trial.

In our analysis it is unnecessary to consider the facts bearing on the commission of the crime itself and we limit our consideration to the events relating to the claimed impairment of the right to counsel. Following his indictment on the two counts of second degree murder and two counts of robbery for the shooting death of a cashier at a grocery store, the defendant was arraigned, informed of his right to counsel, and given one week to retain an attorney. On March 9, 1978 he appeared before the court with attorney

Charles E. Fagan who informed the court that he was not presently retained to represent the defendant. Fagan inquired, however, about possible conflicts of interest involving the recent transfers of Mr. Ronald Gibb from the Public Defender's office to the District Attorney's office and Mr. Richard Slater from the District Attorney's office to the Public Defender's office. The court stated that there was no conflict of interest created by the transfers because a disassociation had been ordered. The court indicated that if the defendant had evidence bearing on any violation of its order it would hear the matter. The claim that Gibb's transfer to the District Attorney's office created a conflict of interest was not referred to again or developed on the record. On this appeal we concern ourselves solely with the contention that Slater's transfer to the Public Defender's office created a conflict of interest with regard to the defendant's case.

On March 16 the defendant and Fagan appeared again before the court. Upon being informed that the defendant was indigent, the court appointed Mr. Bruce Carpenter of the Public Defender's office to represent him. Defendant refused to consent to the assignment stating, "I don't want the Public Defender". Thereafter, defendant in a letter to the court rejected Carpenter's services. On March 20, at his next court appearance with Carpenter, defendant reiterated his objection to representation by the Public Defender but stated that he nonetheless wanted counsel. The court denied defendant's claim that he had the right to refuse the lawyer assigned by the court and to have specific counsel appointed. Carpenter indicated that the defendant

had refused to co-operate with him, and requested that the court appoint an attorney to be in the courtroom with defendant to follow the case. This the court refused to do. Carpenter said that apparently defendant was echoing a previous argument of Fagan that defendant was entitled to assigned counsel of his choice. The assignment of Carpenter was continued. On March 22 defendant again advised the court that he wanted a lawyer, but that he could not accept the Public Defender, and, thus, he was unable to plead because he did not have counsel. The court entered a plea of not guilty on defendant's behalf. Some colloquy then ensued between the court and defendant during which the court stated, "I am giving you another chance. You may make your own choice. One, represent yourself. Two, be represented by the Public Defender. You have no other choice". The defendant answered that he was not competent to defend himself. On his next court appearance the defendant again expressed his unwillingness to accept the representation of the Public Defender. The court then relieved Carpenter of his assignment and noted for the record that the defendant would represent himself.

Throughout the remaining pretrial proceedings defendant was not represented by counsel. On October 3 defendant met with the court prior to jury selection and was given another chance to accept Carpenter as his attorney. Defendant rejected this offer, restated his desire for counsel, and claimed again that he was not competent to represent himself. Further, he declared that the court had appointed incompetent counsel and that Carpenter did not have a desire to defend him. The court advised defendant that Carpenter had no conflicts in the case and that he was an

able lawyer, ready and willing to represent the defendant. Thereafter, the trial began. Defendant was not represented by counsel. In his opening statement he complained about being "forced" to represent himself and the over-all unfairness of the proceedings. Although he denied his guilt, defendant did not actively participate at the trial.

We hold that the court, which properly denied defendant's request for a new counsel, committed reversible error in relieving the Public Defender of his assignment to represent defendant and in thus depriving defendant of his right to counsel at the trial.

It is well established that a criminal defendant has the right to retain an attorney of his own choosing (*People v Arroyave*, 49 NY2d 264, 270), but this right does not encompass the right to an appointed counsel of his choice. "[A]s long as assigned counsel are men of ability and integrity, the discretion and responsibility for their selection rest with the court, to be exercised free of outside interference" (*People v Brabson*, 9 NY2d 173, 181). This is not to suggest that an indigent's request for new counsel should be treated casually. Where good cause is shown, assigned counsel should be substituted (*People v Medina*, 44 NY2d 199, 207).

Good cause did not exist in this case. The claim that a conflict of interest was created by Slater's former employment in the District Attorney's office is without merit. We are cognizant of the holding of the Court of Appeals in *People v Shinkle* (51 NY2d 417) that the transfer of a Public Defender to the District Attorney's office creates a conflict of interest which constitutes a per se disqualifica-

tion of the entire District Attorney's staff from prosecuting a defendant who has been previously represented by the former Public Defender. *Shinkle* has no application, however, to the converse situation which creates no appearance of impropriety or opportunity for abuse of confidence. The danger that previously obtained confidential information will become available to the prosecution simply does not exist when a District Attorney becomes a Public Defender. We conceive of no prejudice to defendant resulting from Slater's former employment; and, indeed, the defendant makes no such claim. Therefore, in the absence of a conflict of interest the court acted properly in denying defendant's request for a change of counsel and in giving him the choice of either accepting the representation by Carpenter or deciding to proceed *pro se*. Defendant chose to do neither. He asserted that he did not want to be represented by a Public Defender, but, at the same time, claimed that he was not competent to represent himself and insisted upon the appointment of an attorney. The court construed these seemingly contradictory representations as a waiver of the right to counsel by defendant and an insistence to proceed *pro se*. They were not.

Clearly, defendant did not meet the requirements that the Court of Appeals has stated for the right to appear *pro se:* "A defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues." (*People v McIntyre*, 36 NY2d 10, 17.) In fact, defendant never re-

quested to represent himself. He insisted throughout the pretrial proceedings and during the course of the trial itself that he was incompetent to represent himself. And once the trial began, he did nothing to assist his defense except to deny having committed the crime (cf. *People v Yates*, 45 AD2d 778).

This case is in many ways similar to *People v Kelly* (60 AD2d 220, affd 44 NY2d 725). In *Kelly* assigned counsel requested to be relieved of his assignment because the defendant told him that he wanted "Allah" as his attorney. When asked by the court if that was his wish, defendant responded that "Allah" would advise him. The First Department, citing *People v McIntyre* (36 NY2d 10, 17, *supra*), ruled that, in view of the defendant's responses that he wanted his attorney dismissed but did not want to represent himself, the court had no choice but to deny defense counsel's request to be relieved of counsel and to continue the representation of defendant by his assigned counsel (*People v Kelly*, 60 AD2d 220, 224, *supra*).

This is precisely the course which the court should have taken in this case (see *United States ex rel. Testamark v Vincent*, 496 F2d 641). Despite defendant's insistence that his attorney be dismissed, he clearly did not want to represent himself. The conviction of an indigent defendant cannot stand if he was not represented at trial, unless there has been an intelligent and competent waiver of counsel (*Faretta v California*, 422 US 806). Carpenter should not have been relieved of his assignment. Defendant did not waive his right to counsel.

This is not the situation, as the dissent suggests, where the defendant's "refusal without good cause to proceed

with able appointed counsel is a 'voluntary' waiver" (*Maynard v Meachum*, 545 F2d 273, 278). A defendant may be properly given the choice of co-operating with his appointed attorney, or representing himself. That decision, however, is personal to the defendant. Here the court itself, when it relieved competent counsel in advance of trial, made the decision that defendant would defend himself.

Accordingly, the judgment of conviction should be reversed and a new trial granted.

SIMONS, J.P. (dissenting). The judgment should be affirmed. Defendant made a knowing and constitutionally acceptable election to proceed *pro se* when he refused to accept properly assigned counsel without good cause. That he also stated that he did not wish to represent himself and his decision was constrained by the court's ruling does not alter the fact that he "voluntarily" chose by default one of the only two alternatives available to him. The right to counsel and the right to proceed *pro se* are "two faces of the same coin" (*United States v Plattner*, 330 F2d 271, 276) and defendant must elect (or, if you wish, waive) one or the other; he cannot have it both ways.

The majority rejects defendant's claim that assigned counsel was disqualified, but it holds that the court committed reversible error as a matter of law by not directing the unwanted attorney to remain available in the courtroom to advise defendant during the trial. In so holding, it relies on *People v Kelly* (60 AD2d 220, affd 44 NY2d 725). That decision, however, is inapposite. The court in *Kelly* did not hold that the court was required to direct advisory counsel to remain in the courtroom during trial in cases

such as this—only that it was not error to do so. In fact, the trial court considered such a solution here but decided against it. We think that it was correct in its decision. Ordering counsel to remain in the courtroom may have been an appropriate exercise of discretion under the rule in *Kelly*, but it was not mandatory, and the court's failure to do so did not constitute reversible error. The only question on this appeal is whether defendant properly exercised his right to assistance of counsel or waived it. The court's assignment or failure to assign a lawyer to remain in the courtroom would not alter that determination, for if defendant did not waive his right to counsel a direction that counsel remain available throughout the trial would not correct the situation and accord defendant the full representation to which he was constitutionally entitled.

Some background is necessary. Most of the facts are found in the record but a few additional and undisputed details which aid understanding are supplied in defendant's brief.

On February 11, 1977 a teen-age girl, Jeanne Humm, was shot twice in the head and killed during the robbery of Hogan's Hut, a grocery store in Stow, New York. As a result of the crime, defendant was indicted for two counts of murder, second degree, and two counts of robbery, first degree. He was eventually located in Maine, extradited to New York and after a jury trial was convicted of two counts of murder, second degree. The crime was unwitnessed but the People convincingly established defendant's guilt through the evidence given by 36 witnesses and contained in 45 exhibits.

When defendant first appeared in court on March 2, 1978, the matter was adjourned so that he might obtain counsel. He appeared a week later with Charles Fagan, his counsel on this appeal. Defendant had not retained Fagan because he was indigent, but Fagan appeared for him (and apparently other indigent defendants as well) as "informal" counsel pending the court's assignment. Before January 5, 1978 Fagan, a Democrat, had been the Public Defender of Chautauqua County. On that date the County Legislature replaced him by appointing the present incumbent, Richard Slater, a Republican and a former Assistant District Attorney.[1] Because of this change in the Public Defender's office, the trial court, by order of January 3, 1978, disqualified Slater from all the Public Defender's pending cases and it directed the Chief Assistant Public Defender, Bruce Carpenter, a hold-over employee with considerable trial experience, to handle those files and to insure that Slater had nothing to do with them. Nevertheless, when Mr. Fagan appeared with defendant in March, he asserted generally that a conflict existed in the Public Defender's office which required the assignment of alternative, outside counsel to represent defendant. The same grounds were to be repeated in several subsequent court appearances and in letters to the Judge from defendant. The court denied defendant's request and assigned Mr. Car-

1. Sometime during the period involved, an Assistant Public Defender, Ronald Gibb, was hired by the District Attorney's office as an assistant. The record does not establish dates or details of the change (see majority opn, p 206). That change in personnel may be the basis for a posttrial application, but the precautionary steps ordered by the court to avoid prejudice to defendant apparently complied with the law at the time (see *People v De Freese*, 71 AD2d 689; *People v Cruz*, 60 AD2d 872; cf. *People v Shinkle*, 51 NY2d 417).

penter to represent him. It stated to defendant and Mr. Fagan, however, that it would consider specific allegations of conflict or other grounds for change of counsel or, alternatively, that it would direct assignment of counsel from the Public Defender's office other than Mr. Slater or Mr. Carpenter, if defendant wished. The court refused to appoint outside counsel, however, because it found no ground necessitating that it subject the county to additional expense by doing so.

This impasse continued through several court appearances extending over several months. The position of defendant never changed despite the court's ruling. Although defendant's claim of prejudice because of the conflict was never supported orally or by formal motion papers, he repeatedly asserted that he refused to "consent"[2] to the assignment of the Public Defender's office but insisted nevertheless, that he required an attorney because he was incapable of defending himself.

Finally, in May, 1978, still refusing to accept the assignment of the Public Defender, defendant brought a *pro se* proceeding in the Appellate Division seeking new assignment of counsel and an order enjoining the trial court from proceeding. Although we denied that application on May 15, 1978, defendant continued to assert that he had a legal right to new counsel and that he was incapable of defending himself. He refused to co-operate with the Assistant Pub-

2. Section 717 of the County Law provides in part: "1. The public defender shall represent, without charge, at the request of the defendant, or by order of the court with the *consent of the defendant*, each indigent defendant" (emphasis added). Defendant apparently believed this statute gave him a veto power over the assignment of the Public Defender.

lic Defender or to discuss his case with him. Finally, when ordered to trial, defendant refused the assistance of the Public Defender and subsequently, during *voir dire* of the prospective jurors, he asked that he be excused from the proceedings.

This conduct in the face of the court's ruling (a ruling which we have unanimously upheld on the two occasions we have considered it) constituted a valid waiver of counsel.

The right of a criminal defendant to assistance of counsel is guaranteed by the Federal and State Constitutions (US Const, 6th, 14th Amdts; NY Const, art I, § 6). Once viewed as little more than the right to the assistance of retained counsel, it is now clear that in most cases a defendant is not only entitled to counsel but also that he is entitled to have legal assistance supplied to him at public expense if he is indigent and cannot retain his own lawyer (see *Argersinger v Hamlin*, 407 US 25; *Gideon v Wainwright*, 372 US 335; *Powell v Alabama*, 287 US 45; see *People v Arroyave*, 49 NY2d 264, 270; *People v Brabson*, 9 NY2d 173). Moreover, although an indigent defendant is not entitled to counsel of his choice, he may request and receive a new assignment for good cause (*People v Medina*, 44 NY2d 199, 207).

The other side of the coin is that a criminal defendant has a constitutional right to waive counsel and represent himself (see *Faretta v California*, 422 US 806). This right has been recognized by the courts with some misgivings stemming from two disparate considerations, the understandable apprehension that a defendant may harm his cause through ignorance or inexperience and concern over preserving the procedural integrity of the trial and public

confidence in the judicial process. Stated another way, the courts, quite properly, must ensure not only that justice is done but that it appears to be done. The right of self-representation cuts against these considerations because it is an unusual defendant who is competent to provide himself with a proper defense. Nevertheless, a defendant may represent himself in spite of his lack of expertise, because the right to determine one's own destiny is one of the most cherished principles in our culture (see *People v McIntyre*, 36 NY2d 10, 14). A defendant is entitled to be master of his own fate and "respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open'" (*United States ex rel. Maldonado v Denno*, 348 F2d 12, 15). Regardless of the rashness of the choice, it is clear that a defendant's election to proceed *pro se* may not be denied solely because he is unschooled in the law or unfamiliar with the courts.

In the usual case, the defendant requests the right to represent himself. That being so, the court is concerned not only with the question of waiver but also the timeliness of his request and his conduct (see, generally, *People v McIntyre*, 36 NY2d 10, *supra*, and cases cited therein). In this case, however, where the election is imputed to him, the court is concerned only whether it appears from the surrounding facts and circumstances that defendant has intentionally abandoned a known right or privilege (see *Johnson v Zerbst*, 304 US 458, 464; see also, *Faretta v California*, 422 US 806).

We have no difficulty in looking behind the words of this defendant and, after examining his actions, determining

that he elected to proceed without counsel. At the time of trial defendant was 31 years old and not unfamiliar with the criminal justice system. He was advised repeatedly of his rights and of the alternatives available throughout the proceedings. Nothing in the record suggests that he did not understand the court's rulings or the alternatives open to him—only that he disagreed with them. Moreover, he was aware that the alternative to his rejection of the Public Defender was a *pro se* defense without counsel in the courtroom to advise him in an emergency. Knowing all this, he refused the assistance of assigned counsel. We see no reason why he should not be charged with the consequences of his acts just as other defendants have been charged with waiving their constitutional rights because of their disorderly conduct (see *Mayberry v Pennsylvania*, 400 US 455 [self-representation]; *People v Palermo*, 32 NY2d 222 [confrontation]), or because they failed to participate in the trial (see *People v Aiken*, 45 NY2d 394 [confrontation]). Defendant's conduct was deliberate and calculated and it was sufficient to establish a knowing and voluntary waiver of his right to counsel. As another court has said, the waiver must be the product of free and meaningful choice but "[t]his does not mean that the decision must be entirely unconstrained. A criminal defendant may be asked, in the interest of orderly procedures, to choose between waiver and another course of action as long as the choice presented to him is not constitutionally offensive * * * The record in this case indicates that, while [defendant] did not affirmatively wish to represent himself, when given a clear choice between proceeding with counsel already appointed or going pro se, he elected the latter * * *

His decision was therefore 'voluntary' unless that choice placed him in a dilemma of constitutional magnitude" (*Maynard v Meachum*, 545 F2d 273, 278; see, also, *United States ex rel. Testamark v Vincent*, 496 F2d 641, 643-644, cert den 421 US 951).

The second consideration, that it appear justice has been done, has undoubtedly influenced the members of the majority in their decision. Thus, they hold that if the court had only continued Carpenter's assignment and directed him to remain in the courtroom, there would be no ground for reversal; in effect they hold that the appearance, if not the fact of legal assistance, would have been satisfied by that course of action. We agree that the presence of trial counsel, even if unheeded by defendant, may serve several legitimate purposes. Not the least of these is that counsel's presence permits the Trial Judge to preside with detachment, whereas, without counsel the Judge may be confronted with the need to help an obviously confused or misguided defendant, or conversely, to interrupt or quiet one who has gotten out of control. In either case, the Judge may be required to "get into the case" with a consequent risk of committing error or appearing biased. Moreover, the presence of assigned counsel, even if unwanted and unused, gives a ready answer to critics—that we have done everything possible. But while the presence of a lawyer, unwanted and unused by the defendant, may be helpful to the court in these troublesome cases, the lawyer can hardly fulfill defendant's constitutional rights to assistance and the issue before the appellate court must narrow down to a question of waiver. In this case defendant continuously refused to discuss the case with Mr. Carpenter and his

election to proceed *pro se* was made after the court had stated that no counsel would be present during trial. Under the circumstances, defendant waived the right to claim on this appeal that the court erred in excusing counsel from the case.

Finally, we are constrained to add that we are at a loss to know what purpose will be served by this reversal. Since we have twice approved Mr. Carpenter's assignment, the trial court, on remittitur, may properly assign him again. Thus, the case will be retried almost five years after the crime (if the People's extensive circumstantial evidence can be reassembled) without defendant having any different or better legal assistance than was available to him at the first trial. Neither justice nor the appearance that justice has been done is satisfied by such a result. The reasonable interpretation of defendant's conduct here is that he waived his right to counsel at the time of trial and he should be held to that election on this appeal.

The judgment should be affirmed.

HANCOCK, JR., and DENMAN, JJ., concur with SCHNEPP, J.; SIMONS, J. P., and MOULE, J., dissent and vote to affirm the judgment in an opinion by SIMONS, J. P.

Judgment reversed, on the law and facts, and a new trial granted.